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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 395

UNITED STATES OF AMERICA,

Petitioner,

vs.

ELINOR CLOSE CUSHMAN, Executrix of the Last Will of William R. Cushman, Deceased.

BRIEF RESISTING APPLICATION FOR WRIT OF CERTIORARI.

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In its combination brief and petition for writ of certiorari, the government seeks to cloak a question of fact in the guise of a question of law.

The trial court found as a fact that the United States, after being fully advised of initial falsity in the insurance application and of the actual facts, "elected to treat such policy as continuing in full force and effect." As a conclusion of law it found that the United States "has ratified such contract of insurance." [1] The District Court of Appeals, in the language of the syllabus of its decision, concluded that "the United States, with knowledge of the true facts relating to such answers, elected to treat the policy as in effect." [2]

[1] Trans. p. 38.
[2] U. S. vs. Cushman, 136 F 2d 815.

Petitioner adopts the word "estoppel" as a substitute for the words "election" and "ratification." Thereby it hopes to interest this court in a question of law, where it obviously would decline to weigh evidence upon pure questions of fact.

The actual questions of fact are as follows:

1. Were the false answers given under circumstances which make them fraudulent or innocent?
2. Was the subject matter material to the insurance risk?
3. Did the insurer waive the falsity and accept the risk subsequently with full knowledge?

The trial court answered them all favorably to the insured. The appellate court examined the evidence and satisfied itself to the same effect. If this court should undertake a review it would have to examine the record not only for the excerpts of evidence quoted in the petition, but for the whole medical history of the insured and all his dealings with the insurer. It would give due regard to the opportunity of the trial court to judge of the credibility of the witnesses.[3] It would doubtless discover, as did the appellate court, that "the findings are not clearly erroneous."[4]

ESTOPPEL NOT INVOLVED.

In entering the field of insurance the United States perforce had to delegate to its administrative officers powers of large discretion. One of these is the weight to be given to answers in an application respecting past medical his-

[3] Rule 52 (a).
[4] U. S. vs. Cushman, 136 F 2d 815 at p. 817.

tory. Had the insured accurately answered the questions complained of, his answers would have been:

"Yes, a tonsilectomy was performed.

"Yes, various physicians were consulted and none found or treated more than minor ailments."

No estoppel would be involved in a decision by the insurer, upon receipt of such an application, that the risk was nevertheless acceptable. Estoppel was not necessarily involved when at a later date this specific information was freely given by the insured. At that time the insurer simply waived the inaccuracy and elected to continue the risk under the facts then disclosed.

We take it to be elementary that a contract induced by mistake or fraud is not void, but merely voidable and that it may be confirmed subsequently by express or by implied agreement.

The decision of this court in *Wilbur vs. U. S.*, 294 U. S. 121, would be excellent authority, through inference, for invoking estoppel where the facts would require and warrant that defense. However, the background of the present case is different in an important particular. In the Wilbur case there was no insurance in force; it had lapsed. Perhaps there is no authority for a governmental officer to restore life to a contract which is already dead.

Here, however, the contract was alive, though afflicted with an ailment which possibly might have justified a government officer in putting it out of existence. [5] At most

[5] Similar false answers to these precise questions are held to be insufficient grounds for avoiding insurance.

The Travelers Insurance Co. vs. Byers, 123 Cal. App. 473; 11 Pac. 2d 444;

Ocean Accident and Guaranty Co. vs. Rubin, 73 Fed. 2d 157.

the insurer was given the same privilege which it had the day when the application first came in: to reject the risk or accept it, according to its discretion. No illegal or unauthorized act was required of the governmental officer on either date in giving approval to the policy. His decision would be binding on the principal.

Just as there may be spheres of activity in which the government is not bound by a representative acting beyond his authority, so there may be circumstances in which an authorized agent does not attempt to bind the principal. The present case involves neither set of circumstances. Veterans Administration had broad powers and wide discretion in the insurance field. Its action in collecting premiums thereafter cannot in common honesty be justified on any basis except that of waiver and confirmation.

The true facts were not received in any incidental fashion and there is no claim in the evidence that they were not fully weighed. After the policy had been in force seven years the insured called upon the insurer to pay disability benefits. The insured demanded a written statement of claim and physician's reports (Trans. 6). On the face of these the original falsity and the true facts were frankly disclosed.

The insurer was charged with important duties in the ordinary conduct of its business:

1. To check the policy for validity and identification of the claimant.
2. To accept or deny liability in general.
3. To check the condition of health as to whether disability existed.

4. To accept or deny liability for the particular disability.

The only ground given for refusing disability payment was that no disability existed (Trans. 3). Bills for premiums continued to go out and regular payments were received for three full years preceding the date of trial. [6]

RULE 52(a) NOT INVOLVED.

Petitioner's next effort is to present some question of construction of the Federal Rules of Civil Procedure. We fail to see how Rule 52(a) is involved. The motion for judgment was made under Rule 54(c), was denied, and the court thereafter made and filed its written findings of fact and conclusions of law. [7]

Petitioner's objection seems to be directed against the language of Judge Mathew's opinion, which states that "Before ruling on the motion it was the duty of the court to make and state its findings of fact." [8] It is not said that the same must be in writing, but undoubtedly the facts on which a trial court would deny such a motion would be the same as those thereafter reduced to the form directed under Rule 52(a).

It seems inconceivable that petitioner would expect the court to accept a defense of fraud without first making a determination of the facts involved. Nor should the court be condemned for embodying that same determination in its formal Findings of Fact and Conclusions of Law.

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[6] On January 16, 1939, petitioner was advised of every fact of fraud now charged (Trans. 33). It continued to collect premiums until February 22, 1942 (Trans. 8).

[7] Recitals, Judgment, Trans. p. 40, 41.

[8] U. S. vs. Cushman, 136 F 2d 815.

PRE-TRIAL STIPULATION.

Even if petitioner were able to present a substantial question worthy of consideration by this court, a more appropriate vehicle should be found than the present case.

The Circuit Court of Appeals chose to base its affirmance of the trial court's judgment on the merits, so no mention is made in the opinion of the pre-trial stipulation entered into. However, this appears in the Transcript of Record.[9] Trial of the issue of fraud was consented to by defendant only in the light of such stipulation.[10] Here we do have a true estoppel, that is:

1. Agreement by counsel that the policy "was granted" and "was converted," implying, naturally, that it was a valid subsisting contract;
2. Change of position by ~~defendant~~ plaintiff in reliance thereon by consenting to consideration of an issue not properly before the court and waiving jury trial thereof;
3. Subsequent attempt to prove that the policy was not effectively granted nor legally converted.

It is with poor grace that petitioner seeks the aid of this court in further delaying payment to the widow and in retention of the premiums which it has accepted after acquiring full knowledge.

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[9] Trans. 8.
[10] Trans. 30.

We respectfully submit that writ of certiorari should be denied.

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